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IN THE SUPREME COURT OF OHIO

VILLAGE OF NEWBURGH HEIGHTS and CITY OF EAST CLEVELAND	:	Case No. 2021-0247
Plaintiffs-Appellees,	:	On appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
STATE OF OHIO,	:	Court of Appeals Case Nos. CA-19-109106, CA-19-109114
Defendant-Appellant.	:	

MERIT BRIEF OF PLAINTIFFS-APPELLEES VILLAGE OF NEWBURGH HEIGHTS AND CITY OF EAST CLEVELAND

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INTRODUCTION

This case emanates from the State of Ohio's ("State") repeated unconstitutional attempts to limit the power of municipalities to implement and operate photo enforcement traffic programs. In 2014, the State signed Amended Senate Bill 342 ("S.B. 342") into law, which allowed municipalities to operate photo enforcement programs only if a law enforcement officer "was present" at each traffic camera, required municipalities to conduct safety studies and public relations campaigns for all traffic camera locations, and prohibited municipalities from issuing photo enforcement tickets for violations within certain speed limits. This Court struck down those provisions of S.B. 342 as violating the Home Rule Amendment of the Ohio Constitution in *Dayton v. State*, 151 Ohio St. 3d 168, 2017-Ohio-6909, 87 N.E.3d 176.

Then, in 2015, the State again attempted to limit the home rule powers of municipalities through Amended House Bill 64 ("H.B. 64"), which required municipalities operating photo enforcement programs to comply with the unconstitutional S.B. 342, or risk losing their local government fund allocations. Several trial and appellate courts struck H.B. 64 down as violating the Home Rule Amendment of the Ohio Constitution. *See, e.g., Toledo v. State,* 6th Dist. Lucas, No. L-15-1286, 2017-Ohio-215; *Dayton v. State*, Montgomery C.P. No. 15-CV-1457 (July 30, 2015); *Akron v. Ohio*, Summit C.P. No. 2015-07-3666 (July 31, 2015). The State did not appeal these decisions.

Relentlessly, in 2019, the State introduced the law at issue, Amended House Bill 62 ("H.B. 62"), which like H.B. 64, would reduce municipalities' local government fund allocations by the amount of photo enforcement program fines collected, and would require municipalities to pay non-refundable court deposits "in advance" for all photo enforcement program cases. The intent and effect of these provisions is to make photo enforcement programs prohibitively expensive and cumbersome to operate.

As was the case with S.B. 342 and H.B. 64, trial and appellate courts across Ohio have struck down H.B. 62 as unconstitutional. *See, e.g., Dayton v. State*, 2d Dist. Montgomery, No. 28818, 2021-Ohio-967; *Toledo v. State*, Lucas C.P. No. CI-0-2018-02922 (Jan. 22, 2021); *Akron v. State*, Summit C.P. No. CV 2015-07-3666 (June 18, 2020). This includes the Eighth District Court of Appeals, which held that the provisions of H.B. 62 that reduce municipalities' local government fund allocations and require them to pay non-refundable, advance court cost deposits for photo enforcement cases violate the Home Rule Amendment. *Newburgh Heights, et al. v. State*, 8th Dist. Cuyahoga, No. CA-19-109114, 2021-Ohio-61.

The State now appeals that decision of the Eighth District Court of Appeals, and offers for this Court two false propositions of law. First, the State proposes that its spending authority is unlimited unless a provision of the Ohio Constitution expressly states otherwise. However, the Home Rule Amendment and other provisions of the Ohio Constitution can indirectly constrain the State's spending authority, as is evident from several cases in which this Court held that budget bills violated constitutional provisions. Moreover, to agree with the State's proposition of law, this Court would have to accept the concept that the Local Government Fund money at issue belongs to the State, rather than taxpayers—including the citizens of East Cleveland and Newburgh Heights. Second, the State proposes that H.B. 62 does not violate the Home Rule Amendment. To reach this conclusion, the State invites this Court to overrule established and recently pronounced Ohio constitutional principles—including the Home Rule Amendment analysis this Court set forth in *Canton v. State*, 95 Ohio St. 3d 149, 766 N.E.2d 963, 2002-Ohio-2005, and *Mendenhall v. Akron*, 117 Ohio St. 3d 33, 881 N.E.2d 255, 2008-Ohio-270, and judicially create new law. The State, however, has offered no legitimate basis for the Court to

depart from this Court's well-reasoned precedent. This Court should therefore affirm the ruling of the Eighth District Court of Appeals.

STATEMENT OF FACTS

I. The Municipalities' Photo Enforcement Programs.

East Cleveland and Newburgh Heights have enacted traffic photo enforcement programs pursuant to the authority granted to them by the Home Rule Amendment of the Ohio Constitution to legislate for the health, safety, and welfare of their residents.

A. East Cleveland's Photo Enforcement Program.

In 2006, East Cleveland enacted its photo enforcement program. (Ex. C to East Cleveland's Mot. for TRO & Prelim. Inj., ¶ 3.) In passing Ordinance 07-06 (codified as East Cleveland Municipal Code 303.011), East Cleveland found "that motorists driving the streets and avenues of the City often have a dangerous disregard for the posted traffic signals and signs," and that "this disregard has caused legislative concern for the health, safety and welfare of [East Cleveland's] citizens and those who visit and do business in [the] City." (*Id.*). Therefore, East Cleveland determined that "an automated red light and speeding enforcement system can assist the City in enforcing the City's traffic ordinances without further taxing the efforts of police officers whose time is in great demand." (*Id.*) On November 8, 2011, East Cleveland's voters approved East Cleveland's photo enforcement program by referendum. (*Id.* at ¶ 4.)

East Cleveland's photo enforcement program has had a measurable impact on the number of speeding and red-light violations in East Cleveland. In December 2010, the average number of red-light violations per camera per month was 324, but this number has been reduced to as low as 200 (even before the COVID-19 pandemic). (*Id.* at ¶ 7.) Similarly, in October 2011, the average number of speed violations per camera per day was 87, which also has been reduced to under 30. (*Id.* at ¶ 9.) The reduction in the number of speed and red-light violations decreases the opportunity

for speed and red-light running related crashes, thereby improving safety on East Cleveland's roadways. (*Id.* at ¶¶ 7-9.) East Cleveland's photo enforcement program has also improved driver behavior. Over the life of East Cleveland's photo enforcement program, the recidivism rate for red-light violations is 12%, which means 88% of violators who receive a ticket and pay it do not get another violation. (*Id.* at ¶ 8.) Similarly, the recidivism rate for speeding violations is 15%, which means 85% of violators who receive a ticket and pay do not get another violation. (*Id.* at ¶ 10.)

East Cleveland's photo enforcement program generates critical financial support for the provision of safety and other services to the City's residents—which are otherwise at a "barebones level." (Ex. D to East Cleveland's Mot. for TRO & Prelim. Inj., ¶ 6.) East Cleveland has been under fiscal emergency for nearly three decades, and has been under its most recent fiscal emergency since 2012. H.B. 62 threatens East Cleveland's public safety and economic well-being to the extent that it puts East Cleveland's local government funds at risk. East Cleveland's major source of revenue is its local government fund allocation from the State, which also supports the City's police and fire departments. (*Id.* at ¶¶ 2, 6.) If this Court reverses the Eighth District Court of Appeals opinion, the spending setoff provision of H.B. 62 would reduce East Cleveland's local government fund allocation by the total amount of fines collected from drivers for photo enforcement program violations. R.C. 5747.503(B)-(C). Thus, East Cleveland would face a dilemma—continue to operate its photo enforcement program and lose its valuable local government funds that support its police and fire departments, or eliminate its photo enforcement program and risk public safety on its streets and sacrifice funds that support the provision of basic services to its residents.

B. Newburgh Heights' Photo Enforcement Program.

On December 30, 2014, the Newburgh Heights Council unanimously passed Ordinance 2014-66, providing for "[c]ivil penalties for Photo Enforcement Program violations." (Newburgh Heights' Mot. for Prelim. Inj., at 4.) The ordinance was codified as Newburgh Heights Codified Ordinance Chapter 315, which has been amended from time to time and presently provides for photo enforcement of speed limit violations. (*Id.* at 5.) The stated purpose of the ordinance is set forth as follows:

> WHEREAS, the Village enacted Codified Ordinance Chapter 315 for the purpose of instituting a program of automated speed enforcement through civil citation;
>
> WHEREAS, the Ohio Legislature recently passed Senate Bill 342 regulating traffic law photo-monitoring devices and S.B. 342 was signed into law by Governor Kasich;
>
> WHEREAS, the Ohio Supreme Court recently issued its opinion in *Walker v. The City of Toledo*, Slip Opinion No. 2014-Ohio-5461, in which the Ohio Supreme Court affirmed its holding in *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, that municipalities have home-rule authority under Article XVIII of the Ohio Constitution to impose civil liability on traffic violators through an administrative enforcement system, and further held that Ohio municipalities have home-rule authority to establish administrative proceedings, including administrative hearings, related to civil enforcement of traffic ordinances.

(*Id.*)

As the stated purpose reflects, Newburgh Heights enacted the photo enforcement program to address public safety. Indeed, motor vehicle accidents resulting in injuries and/or deaths have declined at monitored roadways as a result of Newburgh Heights' photo enforcement program. (*Id.*) Moreover, after Newburgh Heights implemented its photo enforcement program, the Newburgh Heights Police Department reported increased compliance with speed laws at device locations. (*Id.*) In addition, the photo enforcement program allows the Village to enforce speeding laws without sending its police officers onto busy roads and highways, at risk to life and property. (TR 8/27/19 at pp. 149-153; 225-227.)

II. 2014 Amended Senate Bill 342 Struck Down.

H.B. 62 is only the latest in a long series of attempts to limit municipalities' home rule authority to enact traffic photo enforcement programs—all struck down by Ohio courts as unconstitutional. In 2014, the Ohio Governor signed S.B. 342 into law. S.B. 342 allowed municipalities to operate photo enforcement programs only if a law enforcement officer was present at each traffic camera (R.C. 4511.093(B)(1)), required municipalities to conduct safety studies and public relations campaigns for all camera locations (R.C. 4511.095(A)), and prohibited municipalities from issuing photo enforcement tickets for violations not more than 6 mph over the speed limit in school and park zones and not more than 10 mph over the limit in other locations (R.C. 4511.0912).

Municipalities across Ohio challenged the constitutionality of S.B. 342. The Montgomery, Summit, and Lucas County Courts of Common Pleas struck down these provisions of S.B. 342, and issued injunctions against their enforcement. *Dayton v. State*, Montgomery C.P. No. 2015-cv-1457 (April 2, 2015); *Akron v. State*, Summit C.P. No. 2015-02-0955 (April 10, 2015); *Toledo v. State*, Lucas C.P No. CI0201501828 (April 27, 2015). After intermediate appeals, this Court held that these provisions of S.B. 342 violated the Ohio Constitution's Home Rule Amendment. *Dayton v. State*, 151 Ohio St. 3d 168, 87 N.E.3d 176, 2017-Ohio-6909. The Court's lead opinion held that these provisions did not serve any overriding state interest, and therefore unconstitutionally dictated to municipalities "how to use their law-enforcement resources when enforcing their traffic laws, thereby limiting municipalities' legislative power." *Id.* at ¶ 21. The concurring opinion agreed that the provisions violated the Home Rule Amendment, but on the basis that the provisions applied to municipalities and not citizens. *Id.* at ¶ 44 (French, J., concurring).

The Sixth District Court of Appeals then struck down several additional provisions of S.B. 342 that Toledo challenged as also violating the Home Rule Amendment. According to the Sixth

District, S.B. 342 provisions requiring a police officer to examine traffic photo enforcement program violations before issuance, dictating the procedures by which local authorities could issue photo enforcement program tickets, limiting the way hearing officers could adjudicate photo enforcement program cases, and requiring camera manufacturers to provide maintenance records and certificates of operation also unconstitutionally "limit[ed] [Toledo's] municipal power by mandating specific processes and procedures for the municipality to follow and adhere to when implementing its traffic-camera law." *Toledo v. State*, 6th Dist. Lucas, No. L-18-1168, 2019-Ohio-1681, ¶ 76. The State has not appealed this decision.

III. 2015 Amended House Bill 64 Also Struck Down.

Not to be deterred, on June 29, 2015, the State enacted H.B. 64, its biannual budget bill for 2016-2017. Included in H.B. 64 were provisions inserted in a last-minute rider requiring local authorities to do exactly what the State was not permitted to require in *Dayton v. State*: comply with S.B. 342, or risk losing their local government fund allocations.

H.B. 64 provided that any municipality operating a photo enforcement program not in compliance with the unconstitutional S.B. 342 must file a report "that includes a detailed statement of the civil fines the local authority has billed to drivers" every three months. R.C. 4511.0915(B). The local government fund allocations for any authority operating a photo enforcement program that did not comply with the unconstitutional S.B. 342 would be reduced by the amount of fines the local authority "billed to drivers." R.C. 4511.0915(B). Local authorities that operated photo enforcement programs but failed to file their reports would lose their local government funds altogether. R.C. 5747.502. Any local government funds withheld pursuant to H.B. 64 were then to be "redistributed" to the subdivisions in each county that were in compliance with the law, and therefore were not recoverable. *Id.*

Ohio municipalities challenged H.B. 64 in court, arguing again that the contested provisions of H.B. 64 violated the Home Rule Amendment and other Ohio constitutional provisions. The Lucas, Montgomery, and Summit County Courts of Common Pleas enjoined the State from enforcing the contested provisions of H.B. 64. *Toledo v. Ohio*, Lucas C.P. No. CI0201501828 (Oct. 7, 2015); *Dayton v. State*, Montgomery C.P. No. 15-CV-1457 (July 30, 2015); *Akron v. Ohio*, Summit C.P. No. 2015-07-3666 (July 31, 2015). As the Montgomery County Court of Common Pleas held, "[t]he State of Ohio, however, cannot financially penalize the City for challenging the constitutionality of legislative enactments, prevailing on that challenge in a state court, and then acting in accordance with the current state court ruling." *City of Dayton v. State,* Montgomery C.P. No. 2015-CV-1457 (July 30, 2015).

The State appealed the Lucas County order, and the Sixth District Court of Appeals upheld the trial court's judgment, ruling that H.B. 64 impermissibly sought "to resurrect the city's obligation to comply with S.B. 342, with no changes being made to the constitutionally defective provisions, through the use of financial coercion." *Toledo v. State*, 6th Dist Lucas, 2017-Ohio-215, 72 N.E.3d 693, ¶ 25. Consequently, "allowing the provisions to be enforced against the city would result in the city being penalized for its refusal to comply with the very statutes that the trial court already deemed unconstitutional." *Id.* This Court reversed the Sixth District on the technical ground that Toledo did not challenge H.B. 64 in a separate action from its S.B. 342 action. *Toledo v. State*, 154 Ohio St. 3d 41, 2018-Ohio-2358. Toledo subsequently refiled. The Lucas County Court of Common Pleas affirmed its prior decision, finding that these provisions of H.B. 64 were unconstitutional, and permanently enjoined the State from enforcing them. *Toledo v. State*, Lucas C.P. No. CI0201501828 (July 9, 2018). The Sixth District affirmed all aspects of the trial court's decision concerning these provisions. *Toledo v. State*, 6th Dist. Lucas, 2019-Ohio-1681, 130

N.E.3d 341. The State has not appealed this decision, or any of the other lower court rulings holding H.B. 64 unconstitutional. No Ohio court has upheld H.B. 64.

IV. Amended House Bill 62 Is Also Unconstitutional.

On April 3, 2019, Governor DeWine signed into law the legislation at issue in this appeal, H.B. 62, the State's two-year transportation budget bill. Like S.B. 342 and H.B. 64, H.B. 62 contains provisions that impermissibly limit municipal authority to enact photo enforcement programs. The contested provisions of H.B. 62 were reinserted during the final day of the bill's Conference Committee, after having been stripped by the Senate during the committee process before Senate passage.

Very similar to H.B. 64, H.B. 62 requires local authorities to file detailed reports with the State of the civil fines collected from drivers for photo enforcement program violations. Local authorities must identify "the gross amount of such fines" and "the gross amount of such fines that have been collected for violations that occurred within a school zone." R.C. 5747.503(B). As with H.B. 64, local authorities that fail to file reports will lose their local government fund allocations until they are in compliance. R.C. 5747.502(D). Local authorities that operate photo enforcement programs are to have their local government fund allocations reduced by the amount of photo enforcement fines collected from drivers not in school zones. (R.C. 5747.502(C)). Under H.B. 62, withheld funds relating to school zone violations are eventually reimbursed to local authorities, but may thereafter "be used by the local authority for school safety purposes" only. R.C. 5747.502(C). Withheld funds from non-school zone violations are deposited into an "Ohio highway and transportation safety fund" on a prorated basis for each local authority, to be used "exclusively to enhance public safety on public roads and highways within [the local authority's] transportation district." R.C. 5747.502(F).

H.B. 62 also requires local authorities to pay non-refundable, advance court cost deposits covering court costs and fees for non-school zone photo enforcement program violations. R.C. 4511.099(A). These deposits are non-recoverable regardless of the outcome of the case. *Id.* R.C. 4511.099 does not specify total filing fee amounts, but R.C. 1901.26(C) states in part:

> The municipal court shall collect in all its divisions except the small claims division the sum of twenty-six dollars as additional filing fees in each new civil action or proceeding for the charitable public purpose of providing financial assistance to legal aid societies that operate within the state and to support the office of the state public defender[.]

Thus, for non-school zone violations, municipalities will have to pay filing fees of at least $26 per case. When taken as a whole, the intent and effect of the H.B. 62 provisions that have been found unconstitutional by the Eighth District Court of Appeal are to make photo enforcement programs prohibitively expensive and cumbersome to operate.

H.B. 62 went into effect on July 3, 2019. By that date, the Lucas County Court of Common Pleas had already enjoined the State from enforcing the H.B. 62 provisions involving photo enforcement. *Toledo v. State*, Lucas C.P. No. CI-0-2018-02922 (June 28, 2019). The Lucas County court held that Toledo established irreparable harm because "the likely result of the additional cost to the city, and the strain on the resources of the police department and municipal court, would be the cancellation of the traffic camera program." *Id.* Similarly, the Montgomery County Common Pleas Court granted a temporary restraining order in Dayton's favor against the contested provisions of H.B. 62 on July 31, 2019, *Dayton v. State*, Montgomery C.P. No. 2019 CV 03464 (July 31, 2019), and later summary judgment in favor of Dayton, which the Second District Court of Appeals affirmed. *Dayton v. Ohio*, 2d Dist Montgomery, 2021-Ohio-967, 170 N.E.3d 502. The Summit County Court of Common Pleas also preliminarily enjoined the State from enforcing H.B. 62 against Akron on August 22, 2019, and subsequently granted summary

judgment in favor of Akron on June 18, 2020. *Akron v. State*, Summit C.P. No. CV 2015-07-3666. Finally, the Huron County Court of Common Pleas joined the chorus of Ohio trial courts and granted a preliminary injunction against the State enjoining enforcement of H.B. 62. *Monroeville v. State*, Huron C.P. No. CVH20190844 (Dec. 31, 2019).

In June 2019, Newburgh Heights challenged H.B. 62 in the Cuyahoga County Common Pleas Court. East Cleveland later intervened, asserting the same constitutional challenges to H.B. 62. On October 10, 2019, the trial court denied the municipalities' motion for preliminary injunction to enjoin the State from enforcing the spending setoff and deposit requirement, among other contested provisions. The municipalities appealed the decision to the Eighth District. On January 14, 2021, the Eighth District reversed in part the lower court decision, holding that the spending setoff and deposit requirement provisions of H.B. 62 violated the Home Rule Amendment of the Ohio Constitution. The State has appealed the Eighth District Court of Appeals decision to this Court, but has failed to cite even a single Ohio court that agrees with its position that state spending authority is and should be unfettered. Rather, the State would have this Court judicially eliminate the Home Rule Amendment out of the Ohio Constitution entirely.

ARGUMENT

I. Appellant State Of Ohio's Proposition Of Law No. 1:

Because the General Assembly's discretionary spending power can be limited only by an express constitutional limit on the spending itself, not by objections to goals indirectly achieved by the spending, the spending setoff does not violate a city's home-rule power.

A. The State Cannot Threaten To Withhold Money From Municipalities To Discourage Conduct Protected By The Home Rule Amendment.

The State begins with the incorrect premise that "[t]he Spending Setoff regulates the question of whether and how to appropriate *the State's* money." (Appellant's Merit Br. at 3

(emphasis in original).) The local government fund, however, is not comprised of the "*State's* money," but rather money collected from taxpayers, including citizens of East Cleveland and Newburgh Heights. The General Assembly cannot withhold these taxpayer funds from municipalities to discourage them from exercising their rights under the Home Rule Amendment to operate traffic photo enforcement programs. *See Mendenhall*, 117 Ohio St. 3d 33, 43, 2008-Ohio-270, 771 N.E.2d 255 ("[A]n Ohio municipality does not exceed its home rule authority when it creates an automated system for enforcement of traffic laws that imposes civil liability upon violators, provided that the municipality does not alter statewide traffic regulations."). It is unconstitutional, under Ohio law, for the State to punish the exercise of a constitutional right. *See, e.g.*, *State v. Thompson*, 33 Ohio St. 3d 1, 4, 514 N.E.2d 407 (1987) (improper to "penalize a defendant for choosing to exercise a constitutional right").

Moreover, Ohio law protects municipalities from unconstitutional overreaches by the State and allows courts to intervene to protect municipal and other local rights, even when there is no constitutional limit on "spending itself." *See, e.g., Tracy v. Village of Deer Park*, 114 Ohio St. 266, 269, 150 N.E. 27 (1926) (state law violated uniformity clause in challenge by municipality); *Village of Euclid v. Camp Wise Ass'n*, 102 Ohio St. 207, 216, 131 N.E. 349 (1921) (state law violated uniformity clause in challenge by municipality); *Cincinnati Sch. Dist. Bd. of Educ. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St. 3d 308, 317, 744 N.E.2d 751 (2001) (state law violated retroactivity clause in challenge by board of education).

The State contends that it "can spend as it wishes provided that it does not violate any express limit on its legislative authority." (Appellant's Merit Br. at 10.) However, the State does not cite any authority that supports its proposition. Instead, the State merely cites provisions of the Ohio Constitution that require or forbid appropriations under certain circumstances, and that

dictate the manner in which the General Assembly must spend money. (*Id.*, citing Ohio Const. Article VII, Sec. 1.) None of these provisions support the broad and novel proposition that the State's spending authority is unlimited.

Indeed, the Ohio Supreme Court has frequently circumscribed State attempts at spending that violate constitutional requirements. For example, in *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 17, 711 N.E.2d 203 (1999), this Court held that school-voucher program in a budget bill that provided scholarships to students for attendance at private schools violated the one-subject rule of the Ohio Constitution. Article II, Section 15(D) of the Ohio Constitution. Similarly, in *Derolph v. State*, 97 Ohio St. 3d 434, 435, 780 N.E.2d 529, 2002-Ohio-6750, the Court held on reconsideration that a school-funding system implemented by the General Assembly was unconstitutional because it violated Article VI, Section 2 of the Ohio Constitution, which provides that the General Assembly must legislate to "secure a thorough and efficient system of common schools." In directing the General Assembly to enact a school-funding scheme that is constitutional, the Court stated, "[w]e are not unmindful of the difficulties facing the state, but those difficulties do not trump the constitution." *Id.* at 435. There are countless other provisions of the Ohio Constitution that also operate as limits on the State's spending power. *See, e.g.,* Article II, Section 1 ("They [the people] also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided."); Article II, Section 22 ("No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."); Article XV, Section 3 ("An accurate and detailed statement of the receipts and expenditures of the public money, the several amounts paid, to whom, and on what account, shall, from time to time, be published, as shall be prescribed by law."); Article XV,

Section 6(C)(3) ("The proceeds of the tax on gross casino revenue collected by the state shall be distributed as follows . . . ."); Article XII, Section 4 ("The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals."); Article VII, Section 1 ("Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state."); Article II, Section 28 ("The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts.").

Thus, the State's assertion that, "nothing in the Ohio Constitution forbids the General Assembly from using appropriations to encourage (or discourage) activity that the legislature lacks authority to command (or prohibit)," is categorically wrong. (Appellant's Merit Br. at 10-11.) The Home Rule Amendment and other provisions of the Ohio Constitution do constrain the State's spending authority. As the Eighth District Court of Appeals rightfully held, "[j]ust because the state has the power to control state spending does not mean that it has the power to penalize local authorities who are operating traffic-camera programs, something the Supreme Court stated local authorities had the authority to do under the Home Rule Amendment." *Newburgh Heights, et al.*, *v. State*, 8th Dist. Cuyahoga, No. CA-19-109114, 2021-Ohio-61. Indeed, the cases the State cites in support of its sweeping proposition of State authority confirm that the State's spending power is limited by the Ohio Constitution. In *Angell v. Toledo*, 153 Ohio St. 179, 181, 91 N.E.2d 250 (1950), for instance, the Court stated in plain terms: "the General Assembly of Ohio may enact any law <u>which is not prohibited by the Constitution</u>." (Emphasis added.) Likewise, in *State ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cnty.*, 120 Ohio St. 464, 473, 166 N.E. 407 (1929), the Court stated that the authority of the General Assembly is "<u>subject to the express limitations found in the Constitution</u> itself and the implied limitation that it must fall within the

scope of legislative authority, as distinguished from judicial and executive authority conferred upon other departments." (Emphasis added.)

The State offers examples that purportedly show "the General Assembly may achieve through constitutional means that which might be unconstitutional if pursued in other ways." (Appellant's Merit Br. at 11.) However, the State does not provide a single example in which the Court permitted the General Assembly to withhold funding from municipalities to punish the exercise of constitutionally protected Home Rule Amendment rights. Indeed, it is impermissible to punish the exercise of a constitutional right. *See, e.g.*, *City of Akron v. Rowland*, 67 Ohio St. 3d 374, 389, 618 N.E.2d 138 (1993) (ordinance unconstitutional where it would "deprive ordinary people of or discourage them from exercising" constitutional rights); *State v. Thompson*, 33 Ohio St. 3d 1, 4, 514 N.E.2d 407 (1987) (improper attempt to "penalize a defendant for choosing to exercise a constitutional right"); *State v. O'Dell*, 45 Ohio 140, 147, 543 N.E.2d 1220 (1989) (improper to punish exercise of constitutional right). In *Mendenhall*, 117 Ohio St. 3d 33, 43, 881 N.E.2d 255, 2008-Ohio-270 (2008), this Court specifically held that in enacting its automatic traffic camera enforcement ordinance, a municipality "has acted within its home rule authority granted by the Constitution of Ohio." The spending setoff provisions of H.B. 62, which punish municipalities for exercising the right to implement photo enforcement programs, fly in the face of this abundant precedent.

The State also asserts that "the fact that Congress, under Supreme Court precedent, may 'grant federal funds to the States, and may condition such a grant upon the States' taking certain actions that Congress could not require them to take,'" is support for its position that the General Assembly may grant or withhold discretionary appropriations to influence municipal policy

making.[1] (Appellant's Merit Br. at 12.) The U.S. federalism body of law, however, is conceptually and categorically inapplicable to Newburgh Heights' and East Cleveland's entitlement to funding from the local government fund or the State's spending authority.

Even if the spending powers of Congress were relevant, the State's reliance on *South Dakota v. Dole*, 483 U.S. 203 (1987), is misplaced. *Dole* involved "incentives" in the form of financial benefits to states that agreed to raise their drinking ages to 21, not penalties on the exercise of constitutional rights. *Id.* And even if *Dole* were applicable, H.B. 62 cannot satisfy the conditions that must be met in order for a federal incentive program to be permissibly applied to the states, including that the financial consequences imposed by Congress must not be so significant that they amount to coercion. *Id.* at 211. By contrast, H.B. 62 would result in the elimination of East Cleveland's and Newburgh Heights' programs and are therefore coercive. In any event, the State's analysis regarding the spending powers of Congress and the Ohio General Assembly relies on a false premise. The State contends that "Congress *lacks* the power to issue orders to, or to regulate directly, state governments. But as explained above, the Ohio Constitution works the other way: the General Assembly may enact any law that neither the Ohio Constitution nor federal law prohibits." (Appellant's Merit Br. at 13 (internal citations omitted) (emphasis in original).) In reality, however, the separation of powers principles governing Congress and the State General Assembly are very similar. The Home Rule Amendment tempers the State's ability to legislate in violation of municipal rights, much like the Tenth Amendment to the United States

[1] The State did not raise this argument in its merit brief filed in the Eighth District Court of Appeals and therefore has waived this argument. *See Miller v. Miller*, 132 Ohio St. 3d 424, 431 (2012) ("[A]ppellees waived the issue because this argument was not presented before the court of appeals."); *see also State ex rel. DeGroot v. Tilsley*, 128 Ohio St. 3d 311, 313, 943 N.E.2d 1018 (2011) (party waived the Court's consideration of an argument "by failing to raise it in the court of appeals").

Constitution preserves rights to the states. The State's position that the General Assembly's spending authority is unlimited effectively reads the Home Rule Amendment out of the Ohio Constitution.

B. The State Does Have A Duty To Appropriate Funds In Some Circumstances.

The State argues that the spending setoff provisions of H.B. 62 are constitutional because the General Assembly has the power, but not the duty, to make appropriations. (Appellant's Merit Br. at 9.) **This is not true**. As the State points out, Article XII, Section 9 of the Ohio Constitution requires "[n]ot less than fifty per cent of the income, estate, and inheritance taxes that may be collected by the state shall be returned to the county, school district, city, village, or township in which said income, estate, or inheritance tax originates, or to any of the same, as may be provided by law." (Appellant's Merit Br. at 17.) The State argues that this provision does not impose any "*general* requirement to fund municipalities," because "by expressly guaranteeing municipalities funding in these limited contexts, the Ohio Constitution implicitly leaves the General Assembly free *in other contexts* to fund municipalities as it sees fit." (*Id.*) However, Article XII, Section 9 of the Ohio Constitution is not a "limited context." It broadly covers income, estate, and inheritance taxes, a percentage of which funds the local government fund through which the State shares general tax revenue with municipalities. (2007 H.B. 119.) Several other provisions of the Ohio Constitution require the General Assembly to use funds in a specified manner. *See, e.g.,* Article XII, Section 5 ("No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations . . . ."); Article XII, Section 4 ("The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay principal and interest as they become due on the

state debt."); Article VI, Section 2 ("The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state."); Article VII, Section 1 ("Institutions for the benefit of the insane, blind, and deaf and dumb, shall be fostered and supported by the state.").

In addition, the local government fund has a long history in Ohio and was the result of a pact between state and local leaders going back to the State's initial sales tax enacted in 1934. The pact recognized that sales tax proceeds would be drawn from municipalities within Ohio, including communities like East Cleveland and Newburgh Heights. In 1934, the State pledged that it would return 40 percent of sales tax proceeds to local communities. 1934 Am. H.B. No. 134. Thereafter, however, the State has abandoned its pledge. *See* County Commissioners Association of Ohio, *Ohio's Local Government Fund (LGF)*, Ohio County Commissioners Handbook (Sept. 17, 2015), 48-49 ("During the first years of Ohio's sales tax the new SLGF was to receive 40% of the 'residual' after deductions," but "[b]eginning in 1939 Ohio law was changed so that the SLGF no longer received the 'residual' 40%"). Thus, the State's assertion that "the architects of our Constitution had no reason to fear that legislators accountable to voters who live in municipalities would leave those municipalities without funding" has turned out not to be accurate. (Appellant's Merit Br. at 18.)

C. H.B. 62's Reporting Requirement Does Not Authorize The State To Withhold Funds From Municipalities.

The State next argues that, because the General Assembly may require reports from municipalities regarding financial transactions, it is entitled to enforce compliance with the reporting requirement through the withholding of funds. (Appellant's Merit Br. at 21-22.) The State, however, cites no case in support of this proposition. Indeed, it defies logic that the General

Assembly's power to require financial reports from municipalities implies that the General Assembly has unfettered discretion to enforce that requirement through unconstitutional means. For instance, a statute may be constitutional on its face but unconstitutional as applied. *See Wymsylo v. Bartec, Inc.*, 132 Ohio St. 3d 167, 174, 970 N.E.2d 898, 2012-Ohio-2187 (2012) ("A party raising an as-applied constitutional challenge, on the other hand, alleges that 'the application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional."). It necessarily follows that, while the power to require reports from municipalities regarding financial transactions may be facially constitutional, the means by which the State enforces that statute could be unconstitutional, which is indeed the case here.

II. Appellant State of Ohio's Proposition of Law No. 2:

None of the Traffic Camera Law's provisions at issue, including the spending setoff and the Deposit Requirement, violate the Ohio Constitution's Home Rule Amendment.

A. H.B. 62's Spending Setoff And Non-Refundable Deposit Requirement Provisions Violate The Home Rule Amendment.

The Home Rule Amendment authorizes municipalities "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Constitution, Article XVIII, Section 3. The Home Rule Amendment protects the right of local self-government, and as described by the Ohio Supreme Court, was enacted because "the people demanded of the constitutional convention: (1) Emancipation from legislative domination and dependence; (2) emancipation from state and party bosses; [and] (3) nonpartisanship in all purely municipal matter." *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 371, 103 N.E. 512 (1913). The driving force behind the Home Rule Amendment is "that progress in municipalities shall not be hampered by uniformity of action; that communities acting in local self-government may work out their own

political destiny, and their own political freedom, on their own initiative[.]" *Reutener v. Cleveland*, 107 Ohio St. 117, 141-142, 141 N.E. 27 (1923).

A municipal ordinance will not yield to a statewide statute unless, "(1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute." *Mendenhall*, 117 Ohio St.3d 33, 36-37, 881 N.E.2d 255, 2008-Ohio-270 (reordering the sequence of home rule analysis established in *Canton v. State*, 95 Ohio St. 3d 149 (2002)). The Eighth District Court of Appeals correctly applied this test (hereinafter referred to as the "*Canton* test"), and held that the spending setoff and deposit requirement provisions of H.B. 62 are not general laws and are unconstitutional attempts to limit the legislative home rule powers of municipalities.

i. Newburgh Heights' and East Cleveland's Traffic Camera Programs Are An Exercise Of Local Police Power.

The first step of the *Canton* test is to determine whether the ordinance is an exercise of police power, rather than a municipality's power of local self-government. The parties do not dispute that the operation of a traffic camera program constitutes the exercise of a local police power. (Appellant's Merit Br. at 28); *see also Mendenhall*, 117 Ohio St.3d 33, 37, 881 N.E.2d 255, 2008-Ohio-270 ("It is well established that regulation of traffic is an exercise of police power that relates to public health and safety.") Thus, the Home Rule Amendment analysis must proceed to the second prong of the *Canton* test:

> The first part of the test relates to the ordinance. As we have held, "if an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction." If, on the other hand, the ordinance pertains to "local police, sanitary and other similar regulations," the municipality has exceeded its home rule authority only if the ordinance is in conflict with a general state law. **If that ordinance does not relate to local self-government, the second part of the test examines the state statute to determine whether it is a general law.**

See Mendenhall, 117 Ohio St. 3d 33, 36-37 (internal citations omitted) (emphasis added).

The State's assertion that "because the municipalities have failed to explain how a law that does not impinge on municipal authority could violate the Home Rule Amendment, their home-rule claims die aborning," is simply incorrect. (Appellant's Merit Br. at 28.) As set forth by this Court in *Mendenhall*, the Home Rule Amendment analysis proceeds even if the ordinance pertains to local police, sanitary and other similar regulations, as opposed to self-government including the establishment of a civil traffic photo enforcement program. 117 Ohio St. 3d at 36-37. Indeed, this Court has held that a state law that invalidates a municipal ordinance that is an exercise of a municipality's police power, and not self-government, violates the Home Rule Amendment. *See Dayton*, 151 Ohio St. 168, 171, 177 (2017) (state statutes violated Home Rule Amendment even though local ordinance was an exercise of police power). Regardless, the spending setoff and deposit requirement provisions of H.B. 62 do interfere with Newburgh Heights' and East Cleveland's municipal authority. The provisions—which reduce municipalities' local government fund allocations and require municipalities to provide non-refundable advance court cost deposits for non-school zone violations—are an attempt to coerce municipalities into discontinuing their traffic camera programs enacted through each municipality's local legislative and democratic processes by making them uneconomical and cost-prohibitive to operate.

ii. The Provisions Are Not General Laws.

The second step under the *Canton* test is to determine whether the state statute at issue is a "general law." The Eighth District Court of Appeals correctly held that the spending setoff and non-refundable deposit requirement provisions of H.B. 62 are not general laws. To constitute a general law under the *Canton* test, a statute must:

(1) Be a part of a statewide and comprehensive legislative enactment;

(2) Apply to all parts of the state alike and operate uniformly throughout the state;

(3) Set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations; and

(4) Prescribe a rule of conduct upon citizens generally.

Canton, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 21.

Since the *Canton* decision was rendered in 2002, the Court has relied on the *Canton* test over ten times. *See, e.g.*, *Dayton*, 151 Ohio St. 3d 168, 87 N.E.3d 176, 2017-Ohio-6909 (S.B. 342 provisions failed the *Canton* general law test and violated the Home Rule Amendment); *State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St. 3d 271, 37 N.E.3d 128, 2015-Ohio-485 (state ordinance was a general law under *Canton* because it applied to all parts of the state uniformly); *City of Cleveland v. State*, 138 Ohio St. 3d 232, 5 N.E.3d 644, 2014-Ohio-86 (statute satisfied all four prongs of the *Canton* general law test); *Complaint of City of Reynoldsburg v. Columbus Southern Power Co.,*134 Ohio St. 3d 29, 979 N.E.2d 1229, 2012-Ohio-5270 (statute satisfied all four prongs of the *Canton* general law test); *City of Cleveland v. State*, 128 Ohio St. 3d 135, 942 N.E.2d 370, 2010-Ohio-6318 (statute was general law under the *Canton* test); *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St. 3d 96, 896 N.E.2d 967, 2008-Ohio-4605 (statute satisfied all four prongs of the *Canton* general law test); *Mendenhall*, 117 Ohio St. 3d 33, 881 N.E.2d 255, 2008-Ohio-270 (state speeding limit statute was general law under the *Canton* test).

Lower courts likewise have relied on the *Canton* test repeatedly in the twenty years since its announcement. *See, e.g., City of South Euclid v. Fortson*, 8th Dist. Cuyahoga, No. 108269, 2020-Ohio-187, ¶ 14 (state statute satisfies four prongs of *Canton* general law test); *State ex. rel. Osborne v. North Canton*, 5th Dist. Stark, No. 2018CA00132, 2019-Ohio-1744, ¶¶ 27-28 (state

statute was not a general law under *Canton* test because it was not part of a statewide legislative enactment, did not apply uniformly throughout the state, and did not prescribe a rule of conduct upon citizens generally); *Russ v. City of Reynoldsburg*, 5th Dist. Licking, No. 16-CA-58, 2017-Ohio-1471, ¶ 21 (budget bill provision was a general law under the *Canton* test); *City of Dublin v. State*, 2009-Ohio-1102, ¶ 21, 909 N.E.2d 152 (10th Dist. 2009) (statute satisfied all four prongs of the *Canton* general law test).[2]

The State, however, argues that the Court no longer apply the *Canton* test to municipal home rule questions, and invites the Court to overrule years of precedent. (Appellant's Merit Br. at 31.) Specifically, the State argues that the Court should not apply the fourth prong of the *Canton* general law test—"prescribe a rule of conduct upon citizens generally"—to determine whether a law passed pursuant to the General Assembly's spending power is "general" in nature, and instead asks the Court to judicially create new law. (Appellant's Merit Br. at 31.)

First, the State did not raise this argument in its merit brief filed in the Eighth District Court of Appeals, and therefore has waived it. *See Miller v. Miller*, 1332 Ohio St. 3d 424, 431 (2012) ("[A]ppellees waived the issue because this argument was not presented before the court of appeals."); *see also State ex rel. DeGroot v. Tilsley*, 128 Ohio St. 3d 311, 313, 943 N.E.2d 1018

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[2] The Non-Refundable Deposit Requirement is inconsistent with other provisions set forth in applicable photo-monitoring device statutes, and designed for the specific purpose of preventing a municipality from exercising its Home Rule authority. By statute, a motorist who receives a photo citation can elect one of four options (generally) within thirty days: (1) pay the fine; (2) contest the citation in municipal court; (3) file an affidavit to transfer liability to a third party; or (4) do nothing. R.C. 4511.098 and 4511.097(B)(11). A motorist who elects option 1 or 4 admits liability. Id. If a motorist elects option 1, 3 or 4, there is no justiciable controversy. Under option 3, liability is transferred to a third party who then makes his/her/its own election. Only when a motorist elects to contest the ticket is there a justiciable controversy. Yet, the Non-Refundable Deposit Requirement mandates that a municipality pay a filing fee to the municipal court immediately, before the expiration of the thirty-day election period, and even in instances where there is no justiciable controversy.

(2011) (party waived the Court's consideration of an argument "by failing to raise it in the court of appeals").

Second, the State proposes that this Court "simply drop the fourth prong in this one context" or "hold that *Canton* does not apply in this context"—without citing one instance where this Court has applied *Canton* without analyzing the fourth prong of the general law test. (Appellant's Merit Br. at 31.) Indeed, the State disregards that, without exception, this Court has applied the fourth prong of the *Canton* general law test to assess whether a budget bill provision violates the Home Rule Amendment—nearly identical circumstances to this case. In *Dayton v. State*, the concurrence concluded that S.B. 342 budget bill provisions regarding traffic photo enforcement programs failed the fourth prong of the *Canton* general law test because they "apply not to citizens but to municipalities." *Dayton*, 151 Ohio St. 3d 168, 180, 87 N.E.3d 176 (2017) (French, J., concurring; Kennedy, J., joining). And while the lead opinion did not address the fourth prong because it concluded S.B. 342 already failed the third prong, it nevertheless held that "[i]n determining whether a statute constitutes a 'general law' for purposes of the Home Rule Amendment, this court has consistently applied the four requirements laid out in *Canton*[.]" *Id.* at 172. This case therefore does not present any new context that would justify this Court departing from the well-established *Canton* general law test. The Court should apply all four prongs of the *Canton* general law test.

a. The Spending Setoff And Non-Refundable Deposit Requirement Provisions Of H.B. 62 Violate The Third Prong Of The *Canton* General Law Test.

The spending setoff and non-refundable deposit requirement provisions of H.B. 62 fail the

third prong of the *Canton* general law test,[3] which requires a state statute "set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations" to be considered a general law. *Canton*, 766 N.E.2d 963, ¶ 21. As set forth by this Court in *Dayton*, "a statute which prohibits the exercise by a municipality of its home rule powers without such statute serving an overriding statewide interest would directly contravene the constitutional grant of municipal power." *Dayton*, 151 Ohio St. 3d at 172 (quoting *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 48, 442 N.E.2d 1278 (1982)).

This case is no different than *Dayton*¸ and should be controlled by it. In *Dayton*, the Court held that the Home Rule Amendment was violated by S.B. 342 provisions requiring a law enforcement officer to be present at each traffic camera, compelling municipalities to conduct safety studies and public relations campaigns for all camera locations, and prohibiting municipalities from issuing photo enforcement tickets for violations not more than 6 mph over the speed limit in school and park zones and not more than 10 mph in other locations. 151 Ohio St. 3d 168, 87 N.E.3d 176, 2017-Ohio-6909. The lead opinion in *Dayton* determined that each of these provisions violated the third prong of the *Canton* test because they impermissibly limited the legislative power of municipalities without serving an overriding state interest. With respect to the officer-present requirement, the Court concluded that "requiring an officer's presence at a traffic camera directly contradicts the purpose of a traffic camera—to conserve police resources." *Id.* at 174. As for the safety study requirement, the Court held that it did not serve a state interest because the statute did not "serve the purpose of directing that the devices be placed in spots where

[3] The parties do not dispute that the spending setoff and deposit requirement satisfy the first and second prongs of the *Canton* general law test. East Cleveland and Newburgh Heights will therefore only address the third and fourth prongs.

authorities have safety concerns." *Id.* at 175. Finally, the Court determined that the speeding-leeway provision did not serve an overriding state interest because it "would operate as a de facto increase in speed limits in the limited areas covered by a traffic camera." *Id.* at 175.

Here, the spending setoff and non-recoverable deposit requirement provisions of H.B. 62 likewise violate the third prong of the *Canton* test. There is no overriding state interest in any of these provisions, and indeed, the trial court and appellate court found none. The spending setoff provision that reduces municipalities' local government fund allocations serves merely to penalize municipalities that operate photo enforcement programs without any overriding state interest, as the State simply reallocates the local government funds it takes away from offending cities. R.C. 5747.502(F). **Indeed, this provision is indistinguishable from the local government fund provision in H.B. 64 that was struck down by Ohio courts.** The Lucas County Court of Common Pleas called the threatened loss of local government funds implicated by H.B. 64 "economic dragooning," and stated that "any action taken by the State to reduce the City's local government fund distributions for failing to comply with the unconstitutional [S.B. 342] statutes" was unconstitutional. *Toledo v. Ohio*, Lucas C.P. No. CI0201501828; *see also Dayton v. State*, Montgomery C.P. No. 15-CV-1457 (July 30, 2015) (5747.502 imposes an impermissible financial penalty on municipalities); *Akron v. Ohio*, Summit C.P. No. 2015-07-3666 (July 31, 2015). The Sixth District further held that the H.B. 64 provision penalized municipalities for their refusal to comply with statutes already deemed unconstitutional. *Toledo v. State*, 6th Dist. Lucas, 2017-Ohio-215, 72 N.E.3d 693. H.B. 62 is no different.

The non-refundable deposit and spending setoff requirement provision of H.B. 62 also serves merely to limit municipalities' legislative power without serving an overriding interest. The provision acts as a penalty against municipalities that operate photo enforcement programs because

the advanced court costs are non-refundable, **<u>even if a municipality prevails in an individual case</u>.** Indeed, the Sixth District Court of Appeals addressed provisions of H.B. 64 that similarly penalized municipalities operating photo enforcement programs, "dictate[d] the minutia of municipality process," and "micromanag[ed] municipal affairs," and held that such provisions did not serve an overriding state interest. *Toledo v. State*, 6th Dist. Lucas, No. L-18-1168, 2019-Ohio-1681, ¶ 56.

The State notably does not offer any "overriding state interest" for the Court to consider, but rather argues that the spending setoff and deposit requirement provisions of H.B. 62 satisfy the third prong of the *Canton* general law test because "neither law grants or limits municipal legislative power *at all*." (Appellant's Merit Br. at 34.) Specifically, the State asserts that neither provision "prohibits, or limits the permissibility of, traffic-camera programs" nor "dictate[s] the operation of traffic-camera programs." (*Id.*) This is simply not true. The provisions render photo enforcement programs economically impossible to operate, effectively coercing municipalities to discontinue their programs that they enacted pursuant to the democratic processes of their respective cities. This was the General Assembly's design and purpose in enacting H.B. 62 – to make traffic photo enforcement impossible to operate as an economic model. Thus, because the spending setoff and deposit requirement provisions limit the home rule powers of East Cleveland and Newburgh Heights without any overriding state interest, the provisions are not general laws and violate the Home Rule Amendment.

b. The Spending Setoff And Non-Refundable Deposit Requirement Provisions Of H.B. 62 Violate The Fourth Prong Of The *Canton* General Law Test.

The fourth prong of the *Canton* general law test requires the law to prescribe a rule of conduct upon "citizens generally." *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963. Here, the spending setoff and non-refundable deposit requirement provisions of H.B.

62 apply to municipalities, not citizens. *See Dayton*, 151 Ohio St. 3d 168, 172-77, 2017-Ohio-6909, 87 N.E.3d 176 (S.B. 342 provisions fail fourth prong because they apply not to citizens but to municipalities) (French, J., concurring; Kennedy, J., joining). The spending setoff provision of H.B. 62 reduces the local government fund allocation of municipalities, not of citizens. R.C. 5747.503(B); RC. 5747.502(D). The non-refundable deposit requirement provision of H.B. 62 requires municipalities to advance court costs, not citizens. After exhaustive research, there is no other law in the State of Ohio which requires a municipality to advance court costs for enforcing violations of its own ordinances enacted pursuant to its Home Rule powers, violations which at least half of the offenders readily admit to and pay[4]. R.C. 4511.099(A). This is therefore a separate and independent reason why these provisions of H.B. 62 violate the Home Rule Amendment.

The State argues that the Court must examine the challenged law "as a whole," and that H.B. 62, viewed as a whole, prescribes a rule of conduct upon citizens generally because "[i]t tells all parties how their disputes over traffic-camera tickets will be resolved – in what courts, with what procedures, and so on." (Appellant's Merit Br. at 35.) The State, however, does not cite any authority how this could possibly be. Indeed, in *Dayton*, the concurring opinion held that the contested provisions of S.B. 342—not the entire budget bill—did not prescribe a rule of conduct upon citizens generally. 151 Ohio St. 3d 168, 180, 87 N.E.3d 176, 2017-Ohio-6909. The concurring opinion then noted that, "[v]iewing the contested provisions in relation to the rest of S.B. 342 does not lead to a different conclusion." *Id.* It is therefore unnecessary for the Court to consider the entirety of H.B. 62. Even so, the entirety of the Traffic Camera Law of H.B. 62

[4] In the trial court proceedings below, the record indicates that in 2018, between fifty and sixty percent (50-60%) of the offenders that were issued citations via Newburgh Heights' traffic photo enforcement program admitted liability and paid the civil penalty, without the need of either an administrative hearing or court adjudication. (Tr. August 27, 2019, at pp. 139, 146, 178.

prescribes affirmative rules upon municipalities, not upon citizens. For example. R.C. 4511.093 provides the conditions under which a "local authority" may utilize a traffic law photo-monitoring device. Similarly, R.C. 4551.097 provides that means by which a "local authority" shall issue photo enforcement program violations. The statutes clearly do not prescribe a rule of conduct upon citizens.

iii. H.B. 62 Conflicts With The Municipalities' Ordinances.

As set forth by this Court in *Mendenhall*, the Home Rule Amendment analysis does not need to proceed to the third prong of the general law test—"the ordinance is in conflict with the statute"—if the statute is not a general law: "Only when the municipality has not exercised a power of self-government and when a general state law exists do we finally consider the third part of the test, whether the ordinance is in conflict with the general law." *Mendenhall*, 117 Ohio St. 3d 33, 37, 881 N.E.2d 255, 2008-Ohio-270. Thus, the State's argument that the lack of conflict between the spending setoff and non-refundable deposit requirement provisions of H.B. 62 and the cities' ordinances "should independently defeat the municipalities' claim" has no merit. (Appellant's Merit Br. at 36.) As explained above, the spending setoff and non-refundable deposit requirement provisions of H.B. 62 are not general laws, so the Court does not need to consider whether there is any conflict.

Even so, a conflict exists between the statutes and the local ordinances. In *Mendenhall*, the Court stated that an ordinance could conflict with a general law directly or indirectly. A conflict exists when "[an] ordinance permits or license that which the statute forbids and prohibits, and vice versa." *Mendenhall*, 117 Ohio St. 3d 33, 40, 881 N.E.2d 255, 2008-Ohio-270. The State argues that there can be no such conflict because "both state laws regulate matters that municipalities lack the power to regulate—namely, the expenditure of state funds and the procedures in state courts." (Appellant's Merit Br. at 36.) The State's argument, however, relies

on a lofty characterization of the spending setoff and deposit requirement. These provisions directly relate to traffic photo enforcement programs, and they effectively prohibit such programs by rendering them entirely economically and logistically impossible for municipalities to operate. Thus, the spending setoff and deposit requirement indirectly prohibit that which is permitted by local ordinances.

H.B. 62 is the State's latest attempt to eliminate municipalities' ability to exercise their Home Rule power to operate a traffic photo enforcement program – a power this Honorable Court has held as valid. It is a concerted and deceitful effort by the Ohio Legislature to ignore binding legal jurisprudence and further limit Home Rule. Appellees urge this Honorable Court, in the strongest manner possible, to uphold the Eighth District Court of Appeals' decision, and remand the matter for further proceedings.

CONCLUSION

For the above reasons, the Court should affirm the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Merit Brief of Plaintiffs-Appellees Village of Newburgh Heights and City of East Cleveland* was electronically filed with the Court on this August 20, 2021 and that through the Court's electronic notification system a notice of such filing is provided to all registered parties.

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